

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Boston Division

WHITMAN & COMPANY, INC., : Case No. 14-cv-12047-ADB

Plaintiff, :

v. : Boston, Massachusetts
Friday, June 12, 2015

LONGVIEW PARTNERS (GUERNSEY) : 11:39 a.m.
LIMITED, ET AL.,

Defendant. :

: :

TRANSCRIPT OF HEARING ON:
(20, 18) DEFENDANTS' MOTIONS TO DISMISS
BEFORE THE HONORABLE JENNIFER C. BOAL,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff: Seyfarth Shaw
BY: WILLIAM L. PRICKETT, ESQ.
Two Seaport Lane, Suite 300
Boston, MA 02210

For the Defendants: Weil, Gotshal & Manges
BY: PATRICK O'TOOLE, JR., ESQ.
100 Federal Street
Boston, MA 02110

Transcript prepared by: JANICE RUSSELL TRANSCRIPTS
1133 Tanager Trail
Virginia Beach, VA 23451
(757) 422-9089
trussell131@cox.net

Proceedings recorded by electronic sound recording; transcript
produced by transcription service.

1 P R O C E E D I N G S

2 THE COURTROOM DEPUTY: We're on the record in the
3 matter of Whitman & Company, Incorporated v. Longview Partners,
4 et al., Case Number is 14-CV-12047.

5 Will counsel please identify themselves for the
6 record?

7 MR. PRICKETT: Good morning, your Honor. William
8 Prickett on behalf of plaintiff, Whitman & Company.

9 THE COURT: Good morning.

10 MR. O'TOOLE: May it please the Court, Patrick O'Toole
11 for the, for the defendants, your Honor.

12 THE COURT: All right. Good morning, everyone.

13 So I have the defendants' motions to dismiss.

14 So, Mr. O'Toole, I'll hear from you first.

15 MR. O'TOOLE: Thank you, your Honor.

16 Your Honor, as I mentioned, I represent defendants,
17 Longview Partners (Guernsey), Longview Partners LLP, and
18 Longview Partners (UK) Limited. For ease in the discussion,
19 I'd like to refer to them as Guernsey LLP and UK. And as
20 you've mentioned, each of the defendants has moved --

21 THE COURT: And what about the third one? How do you
22 address the third one? So you mean Guernsey LLP --

23 MR. O'TOOLE: And UK.

24 THE COURT: -- and UK.

25 MR. O'TOOLE: Yes. Yep. There's only three

1 defendants in the case.

2 THE COURT: Right. Oh, I see. Guernsey, LLP.
3 Guernsey, LLP and UK.

4 MR. O'TOOLE: Yes. Yes.

5 THE COURT: It's like that eat shoots and leaves. Do
6 you know --

7 MR. O'TOOLE: Exactly, your Honor.

8 As the amended complaint recognized, this action
9 arises from a 2006 exclusive agency agreement between Guernsey
10 and Whitman & Company. Guernsey and Whitman & Company are the
11 only parties and the only signatories to that agreement. LLP
12 and UK are not parties and did not sign.

13 Here, UK and LLP are moving to dismiss the three
14 claims against them, specifically the unjust enrichment claim,
15 Count 8; 93A, Count 9; and conspiracy, Count 10.

16 And Guernsey separately is moving to dismiss Count 9
17 and Count 10, conspiracy and 93A.

18 With respect to UK and LLP, the Massachusetts statute
19 of frauds, Gen. Laws 259, chapter 259, section 7, which governs
20 broker and finder agreements, bars the claims that have been
21 brought against them. The statute expressly bars unjust
22 enrichment claims and derivative claims such as 93A and
23 conspiracy like have been alleged here, which arise out of a
24 claim that somebody was, failed to receive commissions, are
25 also subject to that statute.

1 Moreover, even without the statute of frauds argument,
2 Whitman & Company has failed to state a plausible claim against
3 any defendant on either conspiracy or Section 93A.

4 Just a bit of procedural background, your Honor, this
5 case was originally filed in May of 2014. Whitman & Co. filed
6 its original claim just against Guernsey and LLP alleging
7 breach of contract, unjust enrichment, good faith, and fair
8 dealing. At that time the defendants moved to dismiss on
9 various grounds, including statute of frauds.

10 In response, Whitman & Co. filed the amended
11 complaint, which dropped its contract claims against LLP and
12 its good faith and fair dealing claims against LLP, but it
13 filed the amended complaint which added unjust enrichment
14 claims against LLP and UK and also added UK as a party and
15 added the additional claims of 93A and conspiracy.

16 I think that I'd like to highlight some of the key
17 allegations in the amended complaint that I think are really
18 relevant to what we're arguing. As I mentioned, Paragraph 10
19 of the amended complaint recognizes that Whitman entered into
20 an exclusive agency agreement with Guernsey and that's the
21 contract under which its contract claims are based.

22 Section 11 admits that in 2007 Whitman & Company
23 amended that contract to substitute Whitman & Co. as the sole
24 contracting party with Guernsey. Exhibit A to the amended
25 complaint makes clear that the amendment just substituted

1 Whitman & Co. as a party. All other terms and conditions of
2 the agreement remained in full force and effect without
3 modification. UK and LLP were never added as parties to that
4 agreement.

5 The term of the agreement is from January of '06 to
6 December of 2010 and under the agreement Whitman provided
7 broker-finder type services. As the complaint indicates, he
8 introduced investors, arranged meetings. The agreement also
9 provides that Guernsey, not UK or LLP, would pay Whitman
10 Company a retainer of a hundred thousand, would pay Whitman
11 agent fee, agency fees, which this case is about, your Honor.

12 Importantly, the amended complaint also recognizes
13 that Guernsey, in fact, paid agency fees to Whitman on certain
14 accounts. It recognizes that Guernsey made those agency fee
15 payments to Whitman & Co. between 2008 and the third quarter of
16 2013; that starting in the third quarter of 2013 Guernsey
17 stopped making these payments; that, that the decision to stop
18 was Guernsey, is what's alleged in the case; that Whitman was
19 told in February 2014 that there'd be no further payments
20 because of a settlement and investigation relating to North
21 Carolina.

22 THE COURT: And I believe the plaintiffs had attached
23 that e-mail communication that backs up that allegation in
24 their opposition and I think in a footnote in their reply you
25 said you didn't have objection considering that, I assume

1 because it's mentioned in the complaint.

2 MR. O'TOOLE: Yeah.

3 THE COURT: You're not doubting that today?

4 MR. O'TOOLE: No, we're not, your Honor. And we also
5 -- what we do dispute, though, your Honor, is the suggestion
6 that that was sent on anybody other than Guernsey.

7 THE COURT: Okay.

8 MR. O'TOOLE: There's no indication it was and we
9 think the terms of that itself state exactly why they were not
10 like Guernsey was making the decision not to pay.

11 On March 26th, the amended complaint admits that it,
12 that Whitman & Co. made a written demand on Guernsey, not UK or
13 LLP, for payment of the agreement. And as I mentioned, this
14 action was commenced two months later in May.

15 First, with respect to the unjust enrichment claim
16 against UK and LLP, your Honor, again, Chapter 259, Section
17 7 -- it's the Massachusetts statute on broker and commission
18 agreements -- as I mentioned, the allegations in the complaint
19 and the services that are described in the exclusive agency
20 agreement are those of a broker-finder. We cited cases such as
21 Menturk (phonetic) that described what is meant by a broker and
22 finder and the amended complaint and there really doesn't
23 appear to be much contention that he wasn't doing the services
24 of broker-finder.

25 Chapter 259, Section 7, is very specific, your Honor.

1 It says that contacts like this "shall be void and
2 unenforceable unless such agreement is in writing, signed by
3 the party to be charged." Here, UK and LP, LLP never signed
4 the agreement.

5 Moreover, the statute goes further and it's a little
6 bit different than some other statute of frauds because it says
7 quasi contract claims such as unjust enrichment, like alleged
8 here, are also barred. And the cases that we -- we cited
9 United States Auditing (phonetic), a Mass. case that describes
10 this, and also, there's some appeals court, Massachusetts
11 appeals court cases like Cantelle (phonetic) that says this
12 statute's intended to be interpreted broadly. The statute of
13 frauds in Massachusetts bars the claim Whitman & Co. has tried
14 to bring against UK and LLP for unjust enrichment, in our view.

15 To try to avoid the reach of the statute of frauds,
16 Whitman & Co. relies on a recent case by Judge Casper, License
17 2 Thrill, and I think an analysis of that case indicates that
18 that is not availing to the arguments that they're trying to
19 make forth. The facts of, of that case, it's important to
20 recognize, is that there, one defendant, FreeCause, entered
21 into a marketing agreement that, that could be subject to the
22 finder's agreement in 2008. In 2009, defendant -- and I'll
23 probably say this wrong, your Honor -- Rakuten USA purchased
24 FreeCause and the complaint was filed thereafter.

25 In that case -- and the Court specifically says -- the

1 defendants did not dispute that the agreement was a valid,
2 binding agreement. And it's -- there's defendants, your Honor,
3 but what had happened only two moved to dismiss. The other one
4 didn't because of jurisdictional issues. In the, in the motion
5 to dismiss there's a footnote that references it.

6 Rakuten USA, presumably, succeeded to FreeCause's
7 obligations under the agreement when it acquired it and
8 certainly, there's nothing in the decision or the Court's
9 rationale to suggest that Rakuten USA argued that it wasn't
10 bound by the contract, that it wasn't a party, or that it
11 wasn't, hadn't accepted the terms of that written agreement.

12 They moved to dismiss and I think it's also important
13 because they moved to dismiss on statute of frauds grounds, but
14 their argument was that the plaintiff's claims, the contract
15 claims they were making, related to an alleged oral
16 modification of the agreement as opposed to the actual written
17 agreement which they agreed they were bound by.

18 The Court disagreed and said the claims -- and it
19 really relates to a CBS Sports contract that's referenced that
20 came into existence around the start of the contract, around
21 2008. The timing of that and the specific allegation around
22 the CBS Sports agreement is really important to the analysis
23 because the Court said, no, and particularly with that account
24 the plaintiff had not pursued the defendants for failure to
25 abide by the terms of the alleged verbal modification, but,

1 rather, was suing on the actual terms of the agreement,
2 particularly with regard to the introduction of CBS Sports.

3 So there, they were claim -- they were -- the claim
4 was on a written contract that the defendants agreed they were
5 bound by. And the Court stated in their closing, in summing up
6 her decision, Judge Casper says, "To the extent they're moving
7 to dismiss 93A or unjust enrichment on the grounds that
8 plaintiff is seeking to enforce an unwritten promise to pay
9 commissions, the motion is denied." And the Court's rationale
10 is because the plaintiff was suing on the terms of a written
11 contract that the defendants agreed was valid and binding.

12 In this situation, it's a much different situation,
13 your Honor. UK and LLP have never conceded or suggested that
14 they are parties to that agreement, to the exclusive license
15 agreement. They've never suggested it's binding on them.
16 Quite the contrary. And in contrast, the plain terms of the
17 exclusive agency agreement indicate that Guernsey's the only
18 entity who ever made payments to Whitman, whoever had that
19 obligation to make payments, and who had the ability to refuse
20 to make payments because they were the only person bound by
21 that agreement.

22 Turning to the 93A claim, your Honor, with respect to
23 UK and LLP, again, the statute of frauds, we believe, bars the
24 93A claim against UK and LLP. And we've cited cases,
25 particularly the Corporate Development Staples case, which

1 recognizes that when courts look at cases like this that arise
2 out of claims that somebody was deprived a commission, that the
3 derivative claims that come from that are also subject to the
4 93A. And as I mentioned, the Cantelle, which is the Mass.
5 appeals court case where the appeals court said, "Hey, the
6 Legislature intended that this statute to be interpreted
7 broadly, especially when you're dealing with the concept of
8 these broker-finder agreements."

9 So we would suggest the statute of frauds always, also
10 bars the 93A.

11 But separate and apart from the statute of frauds
12 argument, we think 93A should be dismissed against all
13 defendants because it's, because of several pleading failures,
14 including that there's no unfair and deceptive conduct alleged
15 beyond a breach of contract. And we've cite, cited GMO Trust,
16 which is Judge Woodlock's decision. In that case, there was a
17 failure to deliver Venezuelan oil warrants and the 93A claim
18 was based on false statements after there was a failure to
19 deliver. And in that court, GMO Trust, the Court looked at
20 those claims and said, "They don't rise to the level of a 93A
21 claim." Instead, the Court said, "To establish a 93A
22 violation, the conduct alleged must not only be wrong, but
23 egregiously wrong."

24 And here, your Honor, none of the extortionate conduct
25 that's required for a 93 violation is present. There's no

1 suggestion that the parties strung out a long time with
2 assurances that payment would be made or that was an attempt to
3 divert or prevent that person from seeking redress. These
4 aren't the situations of Anthony's Pier 4 or Arthur D. Little.
5 The, the conduct -- that extortionate type conduct, breach of
6 contract plus, as some of the cases say, extortion, just isn't
7 present here. This is a breach of contract and the mere
8 resistance to a claim is not a 93A violation.

9 And if you look within 93A specifically at the UK and
10 LLP conduct, the defendants -- strike that, your Honor --
11 Whitman & Co. tries to lump together all the defendants with
12 respect to the 93A claim, but you have to look specifically at
13 UK and LLP. They were not signatories to that contract. They
14 had no obligation to pay. Whitman & Co. had been paid for
15 several years till 2013. It had been paid by Guernsey. It
16 says so in the amended complaint. Guernsey stopped paying
17 because, according to the e-mail that's attached to their
18 opposition, because of an investigation and settlement with
19 North Carolina. Whitman & Co. never received payments from UK
20 or LLP. Whitman & Co., frankly, never demanded payment from UK
21 or LLP. The amended complaint indicates a written demand in
22 March was to Guernsey.

23 So there's no basis to claim UK or LLP did anything
24 unfair or deceptive. UK and LP [sic] had no obligation to pay,
25 so there, there was no basis for them to ignore a payment

1 request. The Camden e-mail that's attached, again, your Honor,
2 there's, there is nothing in there to suggest that's sent on
3 behalf of Guernsey or LLP. In fact, it says there'll be no
4 further payments, which would suggest that it's being sent by
5 Guernsey, given that Guernsey's the only person that's obliged
6 to pay on the agreement. Because they have -- because UK and
7 LLP had no obligation to pay, there's no basis to claim that
8 they're trying to extort some kind of compromise or raise a
9 frivolous claim. They don't have the obligation. They hadn't
10 made the prior payments. They're not party to the contract.

11 Similarly, there's a suggestion that somehow UK or LLP
12 ignored the March 26th letter. Again, that was sent to
13 Guernsey. That's what the complaint says.

14 In their brief they try to suggest that somehow maybe
15 LLP's holding back money from Guernsey to avoid payment. That
16 allegation's not alleged in the complaint. By their own
17 admission, it's just conjecture and it can't be the subject of
18 the Court's finding on a motion to dismiss and it's contrary to
19 the language of the exclusive agency agreement. Nothing in the
20 exclusive agency agreement suggests that LLP was going to pay
21 payments to Guernsey to pay Whitman & Co. It's Guernsey was to
22 make these payments.

23 And there's no claim that somehow the suggestion that
24 LLP's holding back money was a basis for this not to pay or
25 something that was put forth to Whitman & Co. to suggest that's

1 why they're not paying. And none of those allegations say
2 anything about UK.

3 UK and LP had no obligation to pay. So they're not,
4 they were never in a position to do what is claimed to be
5 unfair and deceptive. They weren't in a position to renege or
6 ignore or assert a basis not to pay because they didn't have an
7 obligation to pay. Essentially, this is -- 93A boils down to
8 try to lump these, these affiliated companies together and try
9 to create a claim there.

10 Now with respect to Guernsey, your Honor, again, based
11 on the allegation in the amended complaint this is a breach of
12 contract case and mere resistance to a claim is not 93A. And
13 I'd suggest that the Camden e-mail indicates it was a request
14 for payment. We're not paying because of this. Within two
15 months after, they made a demand. After that, they sued within
16 two months. It is not the extortionate, extortionate-type
17 conduct you see in Anthony's where you're leading people on.

18 There's also -- with respect to 93A, it's just a
19 subset and they also fail because 93A requires that the unfair
20 and deceptive act of, act has to cause loss. And with respect
21 to UK and LLP, they had no obligation to pay Whitman & Co.
22 Nothing they did could cause loss and I think on this point the
23 GMO Trust case, again, is instructive.

24 THE COURT: And I, I read the GMO case and I guess
25 I'm, unless I missed it, I didn't see that it said explicitly

1 that you needed more than the breach of contract damages.

2 So were you arguing by extrapolation, or -- I wasn't
3 quite sure.

4 MR. O'TOOLE: I was -- I'm looking -- where I'm going
5 on is such misrepresentation did not cause GMO any additional
6 harm beyond continuing failure to receive the warrants.

7 THE COURT: Okay.

8 MR. O'TOOLE: So that --

9 THE COURT: That's the statutory language.

10 MR. O'TOOLE: Yeah, exactly. And it's -- yes,
11 exactly. And it cites to Framingham Auto Sales and Mass.
12 Employers.

13 THE COURT: Okay.

14 MR. O'TOOLE: And I'm sorry. And I, I only have a
15 Westlaw.

16 THE COURT: That's great.

17 MR. O'TOOLE: It's *10.

18 THE COURT: Right.

19 MR. O'TOOLE: *10.

20 THE COURT: I saw the cite so --

21 MR. O'TOOLE: Oh, okay. That's -- that's the -- yes.

22 And again, here, the allegations and the claims
23 they're seeking is the failure to pay commissions, which is
24 what is the damage available under the exclusive agency
25 agreement that provided they could put that case forward.

1 The next argument, your Honor, is that this 93A claim
2 has to fail because it's not trade or commerce. And with
3 respect to UK and LLP, there's no commercial transaction.
4 They're not a party to the agreement. They had nothing to do
5 with that, that agreement. The only transaction at issue in
6 the case is the exclusive agency agreement between them,
7 between Whitman & Co. and Guernsey.

8 And then, your Honor, I think the Debnam case, the
9 recent First Circuit case, is really directly on point on the
10 trade or commerce argument we're trying to make. And I -- some
11 of the facts, I think, are really important to go over and
12 it's --

13 In Debnam, the plaintiff was an independent contractor
14 for FedEx. He contracted to use their trucking equipment and
15 personnel to do FedEx deliveries. In decision on the summary
16 judgment, the court said it was undisputed that, that "The
17 plaintiff simultaneously operated up to nine delivery routes,
18 each route requiring a separate driver and vehicle.
19 Plaintiff's business employed 60 other drivers to do the work."
20 And that's from the summary judgment decision, 2013 Westlaw
21 5434142.

22 It came to the First Circuit after Judge O'Toole had
23 dismissed it on a, saying it was an employee contract. The
24 appeal said, "Hey, I was an independent contractor trying to
25 preserve the 93A claim." And the court's analysis is really

1 instructive. It says that for Section 11 to apply both parties
2 have to engage in trade, trade and commerce and offering
3 services like Whitman & Co. did here or the delivery services
4 in Debnam, Debnam, only qualifies if that service is offered
5 generally by the person for sale to the public in a business
6 transaction.

7 The First Circuit upheld the dismissal not on the
8 grounds of that he was an employee, as Judge O'Toole did. He
9 said it didn't matter if he was an employee or an independent
10 contractor and even if you presumed he was an independent
11 contractor, it's still not trade or commerce because the
12 plaintiff's delivery services were not generally for sale to
13 the public in a business transaction, but were, rather,
14 exclusively provided to FedEx.

15 Like Whitman & Co.'s business, Debnam involved an
16 exclusive relationship where the services were devoted to
17 FedEx. Any attempt to distinguish that, there's no suggestion
18 in the amended complaint this was anything other than an
19 exclusive relationship.

20 Further, if -- in looking at the pleadings in Debnam,
21 the motion to dismiss attaches the contract to the -- to -- in
22 Debnam and that would even suggest that Debnam might have had
23 the right to seek other work. There's specific provisions in
24 it, but there's no allegation in the complaint that he did
25 anything but an exclusive relationship.

1 And that's what we have here, your Honor. Just like
2 Debnam, the amended complaint is clear Whitman did these
3 services exclusively for Guernsey and as a result, doesn't
4 suffice for 93A.

5 We also think that Pine Poly on primarily and
6 substantially, the recent decision by Judge Gorton, it
7 really -- the focus on substantial, primarily and substantially
8 in Massachusetts is that the center of gravity of circumstances
9 giving rise to the claim. That's what people -- what -- what
10 Judge Gorton suggested has to be analyzed.

11 And here, the plaintiff resides in Massachusetts or is
12 Massachusetts, but none of the other conduct or connections are
13 present to, to give it a basis to be primarily and
14 substantially Massachusetts. The defendants are from the
15 British Isles. None has a Massachusetts company. The conduct
16 didn't occur in Mass. None of the clients identified in the
17 amended complaint are Massachusetts. The settlement agreement
18 -- the settlement discussion that they suggest was the
19 frivolous basis relates to North Carolina.

20 So it doesn't have the connection to Massachusetts
21 that requires it to be tethered to the 93A.

22 So we would suggest that 93A should be dismissed on
23 all defendants for all of these reasons.

24 And in the conspiracy claim, your Honor, first, if the
25 Court accepts any of the arguments on 93A, the conspiracy

1 claim, either the statute of frauds or the other grounds I
2 ticked off, your Honor, this claim must be dismissed because
3 there's no underlying tortious conduct that's identified in the
4 complaint besides 93A violation. And even if the Court doesn't
5 accept those 93A arguments, this count should still be
6 dismissed against all of the defendants, your Honor, because
7 here, Whitman & Co.'s alleging a concerted-action conspiracy
8 and that requires -- the case law that both parties, I think,
9 have cited requires that, that the defendants have knowledge of
10 the other's tortious conduct; that they act with the intent to
11 substantially assist; that they give substantial assistance to
12 the tortious conduct; and that assistance is a substantial
13 factor in causing the tort.

14 And if you take a look at the cases they cite to say
15 this is what a concerted-action conspiracy looks like. None of
16 this conduct is the type of conduct or level of conduct as
17 alleged. In Aetna, you have a wife who's insured by Aetna who
18 brings six false claims supported by a defendant who provided
19 false appraisals about work her husband in the auto body
20 industry allegedly did where she reports to Aetna that the work
21 was completed.

22 In Cothroes (phonetic), you have an improper
23 foreclosure where somebody who doesn't have title to property
24 transfers, does a fraudulent assignment to another party to
25 foreclose on that.

1 In Brothers, you have two police officers who, who
2 worked together to turn on an Internal Affairs officer by
3 conducting an inaccurate investigation and destroying evidence
4 in an effort to have her fired.

5 Or in Crooker, you have attorneys who try to
6 orchestrate a majority buyout and a breach of fiduciary duty.

7 If you compare that to the actions, the conduct that's
8 alleged here relating to UK and LP, again, the claims against
9 UK and LLP are wholly conclusory. They try to just group them
10 altogether with Guernsey. There's no facts that UK or LLP
11 participated in or provided substantial assistance, no facts
12 that they did anything where they had, especially when they had
13 no payment obligation under the agreement. There's nothing to
14 suggest they had the requisite knowledge that they were helping
15 somebody or providing a substantial, substantial assistance.
16 UK and LP had no payment obligation to Whitman.

17 So there's no inference that they ignored payment
18 demands, withheld payment or tried to exact a compromise.

19 We'd also suggest that it's instructive to look at the
20 Platton (phonetic) case we, we cited where -- it's a breach of
21 contract case -- the First Circuit says that has been somehow
22 misconstrued because of corporate affiliations into a
23 conspiracy-type claim. And we think that's what's going on.

24 For Guernsey, your Honor, the conspiracy claims also
25 fails because it's, again, it's a breach of contract claim.

1 You can't breach, you can't conspire to breach a contract and
2 you can't conspire with yourself, your Honor.

3 For these reasons, we request that the complaint be
4 dismissed in its entirety as to UK and LLP and that Counts 9
5 and 10 be dismissed as to Guernsey, your Honor.

6 THE COURT: All right. Thank you.

7 Mr. Prickett.

8 MR. PRICKETT: Thank you, your Honor.

9 I think I will take the arguments in the order that
10 they were just -- just --

11 THE COURT: That would be great.

12 MR. PRICKETT: -- presented by Mr. O'Toole.

13 So I'll start with the statute of frauds.

14 THE COURT: Uh-huh (indicating an affirmative
15 response).

16 MR. PRICKETT: And assuming for the sake of argument
17 that that statute, 259, Section 7, in fact, would apply to the
18 contract here --

19 THE COURT: And, and that was going to be one of my
20 questions.

21 MR. PRICKETT: Yeah.

22 THE COURT: Are you disputing that it applies?

23 MR. PRICKETT: Frankly, we don't really take a
24 position in our papers --

25 THE COURT: Okay.

1 MR. PRICKETT: -- on that. I'm not sure that I want
2 to -- I'm going to concede that it does apply here.

3 THE COURT: Okay.

4 MR. PRICKETT: In fact, I'm not going to concede it
5 does apply here.

6 THE COURT: Okay.

7 MR. PRICKETT: But let's assume for the sake of
8 argument that it does apply here. I think it's irrelevant
9 because the purpose of that statute like any statute of frauds,
10 regardless of what's stated or enacted in, is to avoid a
11 situation where a plaintiff essentially, because there is no
12 written contract, tries to allege that there was a contract
13 either orally or on some other basis or some sort of quasi
14 contract, as, as is the case here in this statute. In other
15 words, attempting to essentially create a fraudulent claim that
16 there was, in fact, a contract. And that's the purpose of it
17 and that's why it doesn't apply here. Because we have a
18 written agreement and there is no dispute by the defendants
19 that there is a written agreement between my client, Whitman,
20 and Guernsey. And for that reason alone that argument is
21 completely misplaced by the defendants.

22 THE COURT: Even as to, what are we calling them here,
23 LLP and UK?

24 MR. PRICKETT: Yes.

25 THE COURT: Okay.

1 MR. PRICKETT: We're not asserting any contract claim
2 against them. So why would they --

3 THE COURT: Oh, because --

4 MR. PRICKETT: Why would they --

5 THE COURT: -- of unjust enrichment.

6 MR. PRICKETT: Right.

7 THE COURT: Okay.

8 MR. PRICKETT: Exactly.

9 So --

10 THE COURT: But what about Mr. O'Toole's argument that
11 the, the breadth of the statute includes quasi contract?

12 MR. PRICKETT: Sure. And that's why I think the
13 License 2 Thrill case --

14 THE COURT: I see.

15 MR. PRICKETT: -- is critical here.

16 THE COURT: Okay.

17 MR. PRICKETT: Because there really isn't any case law
18 on this other than that case because why would someone assert a
19 statute of frauds defense when there's actually a written
20 contract? And it makes perfect sense. It's, it's a sleight of
21 hand that the defendants are trying to, to assert here. It's
22 creative, I will give them that, but it doesn't work and Judge
23 Casper's decision, I think, really shows that.

24 I think it's on all fours. I think the type of
25 arrangement in License 2 Thrill is very akin to the contract

1 here and the only way that I heard and saw in their opposition
2 and, actually, their reply brief that they can distinguish this
3 is to make the presumption that somehow when FreeCause was
4 acquired by the other entity, Rakuten, that, presumably, I
5 think is the word they used, the obligation was acquired by the
6 acquiring company. There's nothing in the decision that says
7 that. In fact, I think the decision supports the opposite of
8 that, which is the, the only claim, contract claim here in
9 License 2 Thrill was against the party that the, the only party
10 that signed the contract.

11 So I think it really is on all fours here and although
12 the analysis by Judge Casper isn't elaborate, clearly she says
13 that, "To the extent that the defendants move to dismiss the
14 93A and unjust enrichment claims on the grounds that plaintiff
15 isn't seeking to enforce an unwritten promise, the court denies
16 the motion for the reasons discussed above." In other words,
17 if there was, in fact, a written agreement.

18 So again, the slight difference in that case is that
19 the allegation was that there was also a -- well, there's a
20 defense, "We thought there was a modification." That doesn't
21 apply. That doesn't apply here, but I think that's beside the
22 point. The point is is that there were unjust enrichment and
23 93A claims asserted in that case against the parties other than
24 the party to the contract. Those parties sought to dismiss
25 those claims on the grounds of the statute of frauds and the

1 court denied the motion on the grounds that there was a written
2 contract between at least one of the parties.

3 So I think that disposes of the statute of fraud
4 argument with respect to all of the defendants that assert it.

5 The other point I would, I would make on the statute
6 of frauds is that every other case that the defendants cite in
7 their moving papers, their opposition papers and their reply,
8 the, the facts in those cases were that there was no written
9 agreement. And those are, I think, critical distinctions to
10 our case.

11 Now let me turn, if I may, to 93A unless there are
12 questions.

13 THE COURT: No. That's fine.

14 MR. PRICKETT: Okay.

15 93A, the question here, Your Honor, is whether we
16 assert a plausible claim, not whether we can prove our claim
17 based on what's alleged in the complaint. And I would suggest
18 to the Court that what we do allege in our complaint, we
19 believe, is the tip of the iceberg.

20 What we allege in this complaint is that we have a
21 money management firm in the UK which it's not one company.
22 It's three -- it's actually several companies, but three of
23 which are defendants in this case. And I think it's important
24 for the Court to recognize, as the amended complaint states,
25 these companies don't act in isolation from one another. They

1 are part of the family of, of companies that work together in
2 order to provide services to their clients.

3 THE COURT: And I saw those allegations --

4 Mr. PRICKETT: Yes.

5 THE COURT: -- but there don't seem to be any
6 specifics about, that back up those allegations.

7 So, for example, alleging overlapping corporate
8 ownership by naming the overlapping persons and those sorts of
9 allegations.

10 MR. PRICKETT: Okay. That's true. We do not identify
11 the names of the principals specifically in that complaint.
12 That, that is accurate, but the fact that remains is that that
13 is the case and I have not heard any dispute from the
14 defendants as to that issue.

15 The complaint does state that the management entity,
16 the entity that actually managed the, manages the funds that
17 are entrusted to Longview, actually two of them. It's, it's
18 LLP and UK. UK is the managing member of LLP. Those folks
19 actually managed the money. Guernsey is the back office
20 operation that deals with the administration of the, of the
21 funds, including the transfer of assets and disbursement of --
22 of -- disbursements that the entities owe, including the
23 disbursements in the amounts owed to Whitman.

24 So as a matter of fact, it is alleged that the money
25 that was earned by LLP and UK, a portion of that based on the

1 percentages in the contract has to be paid to Whitman and the
2 entity that actually physically pays Whitman is Guernsey.

3 So as is alleged in the complaint, the money is
4 transferred to Guernsey. Doesn't just appear at Guernsey
5 metaphysically. It has to be transferred from UK to, either UK
6 or LLP, or both to Guernsey and then from Guernsey to Whitman.

7 So that, that is an important fact that's alleged
8 that, that undermines, or is the foundation for the 93A and
9 simple conspiracy claims.

10 THE COURT: And, you know, I believe that you've also
11 stated both in the complaint and the brief that the
12 extortionate conduct was designed to coerce Whitman to accept a
13 lesser sum in settlement, but where are the factual allegations
14 that support that conclusion?

15 MR. PRICKETT: The factual allegations are the
16 following -- and I will, I will state candidly that they're
17 somewhat passive aggressive. Their behavior is somewhat
18 passive aggressive and that's when I say --

19 THE COURT: Not your statements are passive
20 aggressive.

21 MR. PRICKETT: Yeah.

22 -- that we don't have an e-mail that says, "Dear
23 Mr. Whitman, We hereby refuse to pay you and we're not going to
24 tell you why," or an e-mail that says, "We will pay you," and,
25 in fact, they don't.

1 So when I say it's the tip of the iceberg we believe
2 that those e-mails exist, but we do not have them in our
3 possession at the moment.

4 But what we do have is you've got these money managers
5 in the UK, very wealthy, very large. They, for whatever
6 reason, completely ignored Whitman for nearly a year in his
7 efforts to find out why they weren't paying him, what's going
8 on, what's the problem here. And we believe that it wasn't
9 just one defendant. We believe they are all acting together
10 because they all are owned by the same people and they all work
11 in a interrelated way.

12 Secondly, when they finally did respond we have the
13 very short terse e-mail, which I would point out is, "I spoke
14 with the folks at Longview Partners." It doesn't say Longview
15 Partners (Guernsey). It doesn't say Longview Partners (UK).
16 It doesn't say LLP. I don't think that was an oversight. I
17 think that their lawyer was referring to them as a collective
18 and the defendants are forced to argue that, "Well, presumably
19 or logically he was referring to Guernsey," but I think that's,
20 that's merely argument and certainly doesn't go to whether or
21 not the allegations in the complaint are adequate.

22 That response, from our point of view, is, is not a
23 basis. It is an invalid and, and non-existent basis to not pay
24 under the contract, certainly with respect to the six other
25 clients that were not North Carolina. These clients, by the

1 way, are state pension, state pension investors. But even with
2 respect to North Carolina, we actually don't know what the
3 agreement was between Longview Partners and North Carolina.
4 What we do know is that the net result of that agreement was
5 that North, that Longview partners agreed to reimburse some of
6 the management fees. We don't know how much or what the
7 magnitude is, but there was some reimbursement. We had no
8 involvement in that negotiation --

9 THE COURT: But why --

10 MR. PRICKETT: -- whatsoever.

11 THE COURT: Can I consider that, those arguments on a
12 motion to dismiss?

13 MR. PRICKETT: I don't think you actually can --

14 THE COURT: Okay.

15 MR. PRICKETT: -- but I'm addressing them.

16 THE COURT: Okay.

17 MR. PRICKETT: Because I don't -- I think the Court
18 needs to look only, or is required to look only at the
19 allegations --

20 THE COURT: Right.

21 MR. PRICKETT: -- in the complaint and not to any
22 defensive arguments that are raised in briefing.

23 THE COURT: Okay.

24 MR. PRICKETT: Because I don't think -- and I was
25 going to get to that -- but --

1 THE COURT: Okay.

2 MR. PRICKETT: But I don't think --

3 THE COURT: I mean, I think --

4 MR. PRICKETT: I suppose you -- you could --

5 THE COURT: -- I can consider the e-mail, but I'm not
6 sure I can consider much beyond that.

7 MR. PRICKETT: I think that's right. I think that's
8 right.

9 But even if you could consider it --

10 THE COURT: Right.

11 MR. PRICKETT: -- it's not a basis and from our
12 perspective it's a groundless assertion as a defense and we
13 believe that shows, it's made in bad faith and we allege that.

14 And finally, we have a continuing course of conduct
15 when we sent a demand letter before commencing the lawsuit
16 saying, "Look, that is not a basis for, for nonpayment. If you
17 have any other basis, let's talk about it. Otherwise, we
18 expect to receive payment." And again, completely radio silent
19 response. And I think that this is designed to coerce Whitman
20 into dropping his case or accepting some sort of compromise.
21 And that's why this is not just a breach of contract. That's
22 why there is a extortionate quality to the behavior of the
23 defendants.

24 The, the defendants argue that with respect to LLP
25 and, and UK because they're not parties to the contract how

1 could they have engaged in any kind of extortionate conduct.
2 And again, our allegation is that they work together as a
3 family of companies. They -- they -- their functions are
4 interdependent and these principals of the -- of the -- the
5 overlapping, overlapping principals have agreed either to
6 withhold money from LLP to Guernsey or to prevent Guernsey from
7 making the payments to Whitman.

8 As to trade or commerce, your Honor, we are dealing
9 with a investor's broker and a very large money management firm
10 in the UK and then clearly, these two entities are engaged in
11 trade, trade and commerce. The, the FedEx case that the
12 defendants cite in their reply papers I think is, is off point.
13 And I think it's more like the other cases they cited in their
14 opening, opening papers in the sense that either it's a quasi
15 employment-type relationship, or it has that private type of
16 relationship that is essentially employment like. And I think
17 one of the key parts to the FedEx case that, that was not
18 mentioned is the finding by the court that the plaintiff in
19 that case never, although had the opportunity, never amended
20 the complaint to allege anything other than an employment
21 relationship.

22 So the court, the First Circuit was, essentially,
23 stuck with that, that set of facts and although it was
24 ultimately determined by the court that it was an independent
25 contractor versus employment, it, they were kin to one another.

1 And so while it precluded a wage claim it didn't permit a 93A
2 claim because that relationship was private.

3 Here, Mr. Whitman is in this business. There is no
4 allegation, there's no evidence and the defendants certainly
5 cite nothing that Mr. Whitman was precluded from providing
6 these services to anybody else.

7 So it's, it's a different set of facts here and I
8 think it's, it's an agreement that doesn't apply.

9 As to damages, your Honor, the cases are a little bit
10 inconsistent on this point. There are cases which say that the
11 -- if you have a contract and a 93A claim in the same case, as
12 is often the case, of course, the 93A conduct is going to
13 somehow arise out of the contractor relationship and there are
14 cases which say that the contract claims can also be recovered
15 as 93A damages. And there are cases which say, such as the
16 Arthur D. Little case which say that you can also have a damage
17 claim that is in the form of loss of the use of the money or
18 expenses. And certainly, those apply here. We have a
19 situation where Whitman is not only owed under the contract,
20 but he is owed additional amounts for the loss of the use of
21 that money, which is now going on more than two years as well
22 as the expenses that he has incurred in its efforts to try to
23 get that, get that paid.

24 So I think that Arthur D. Little is, is a good example
25 of that and I think that we have alleged sufficiently a damages

1 claim under 93A.

2 Turning to the primarily and substantially test, first
3 of all, notwithstanding the Poly Pine case, which I think is a
4 little bit different and I'll explain why, generally speaking,
5 the law is that it's not an appropriate inquiry at the motion-
6 to-dismiss stage. It's a fact-intensive inquiry. It's a
7 balancing of the center of gravity test and courts generally
8 will not dismiss a complaint based on that if that defense, on,
9 on a 12(b)(6) motion. And we believe that this Court should
10 not as well.

11 Notwithstanding that, we certainly have a
12 Massachusetts plaintiff. We have conduct that was directed to
13 a Massachusetts plaintiff and there are numbers of, a number of
14 cases which say that the, where the harm is suffered is a
15 germane factor to consider when the appropriate time is to
16 consider, when it is appropriate to consider the center of
17 gravity test.

18 I would also point out that I think it's irrelevant
19 that the clients of Longview are in North Carolina and Idaho
20 and Washington because we're not saying that those folks did
21 anything wrong. We're saying that Longview hurt us and
22 certainly while the conduct of Longview may have occurred
23 outside the United States, it certainly was felt here in
24 Massachusetts.

25 Finally, with respect to civil conspiracy, it's true

1 that if the 93A claim falls, that's the -- that -- that is the
2 tortious conduct. The conduct that also constitutes a 93A
3 violation is the conduct that is tortious, as alleged in the
4 complaint.

5 So if the Court were to dismiss the 93A, I, I believe
6 it would also be appropriate to dismiss the conspiracy claim.
7 But for the reasons I've articulated, we don't think the 93A
8 claim should be dismissed. We think it's more than plausible
9 what these folks are doing to Mr. Whitman.

10 And in terms of the agreement, the complaint lays out,
11 as I've, as I've touched upon, the relationship, the
12 relationship between the three defendants, what their roles,
13 their respective roles are, the complaint and, and the
14 agreement lays this out, and these folks have overlapping
15 principals and from our perspective, they have not acted
16 independent of one another, they have not acted in isolation,
17 they have acted together, and have a plan to either prevent the
18 money from leaving the UK to go to Guernsey, or, if it's
19 already in Guernsey, to prevent it from coming to Whitman. And
20 that is their plan and that is the basis on the conspiracy.
21 The fact that that conduct may not be as shocking and as
22 egregious as is, as in some of the other cases cited, that
23 doesn't mean it's not out adequately pled in this case.

24 One other point I want to make on the unjust
25 enrichment allegation is that I want to make sure the Court is

1 clear what our position is. And that is the allegation is that
2 the reason UK and LLP are unjustly enriched is based upon
3 whether that money has been held in the UK, or not. In other
4 words, if the money has been transferred to Guernsey, it's
5 probably not the case that these other entities have been
6 unjustly enriched, but our allegation is that the money has
7 been held in the UK with LLP and Longview (UK).

8 THE COURT: Is there an actual allegation in the
9 complaint to that effect?

10 MR. PRICKETT: Yes.

11 THE COURT: That the money's being held in the UK?

12 MR. PRICKETT: That the money has -- the -- the --
13 it's pled in the alternative, your Honor.

14 THE COURT: Okay.

15 MR. PRICKETT: If you look at Paragraph 137 and 138,
16 to the extent that those defendants, other than Guernsey -- in
17 other words, the other two defendants -- have failed to
18 transfer to Guernsey the money --

19 THE COURT: I see.

20 MR. PRICKETT: -- that they should not be allowed to
21 prosper. Okay.

22 So that's the basis on which those other defendants
23 have been unjustly enriched.

24 THE COURT: Okay.

25 Thank you.

1 MR. PRICKETT: Thank you, your Honor.

2 THE COURT: Mr. O'Toole, anything --

3 MR. O'TOOLE: Yes, your Honor, I just have a --

4 THE COURT: Yes.

5 MR. O'TOOLE: -- few points.

6 And picking up on, on that point that --

7 THE COURT: Uh-huh (indicating an affirmative
8 response).

9 MR. O'TOOLE: -- the last point, your Honor, that
10 allegation itself is just pure conjecture. That's not a fact.
11 It's a suggestion that possibly --

12 THE COURT: I might have to construe it in his favor.

13 MR. O'TOOLE: But, but even his -- his -- even within
14 his complaint and his amended complaint, he says, "To the
15 extent or if they are."

16 But, but further, your Honor, I think it also ties to
17 the point of what's required to be pled here. And this
18 overlapping concept of different family relationships within a
19 corporate structure, that's not enough to get over the pleading
20 standard. You have to -- even under 8, Rule 8, you have to say
21 what each defendant did and what, how that supports a claim.

22 And here, your Honor, Paragraph 10 says these claims
23 arise out of an exclusive agreement between Guernsey and
24 Whitman & Co. There's no suggestion that UK or LLP have
25 anything to do with that agreement; that they've done anything

1 to stop the payment of that;, that they had any obligation to
2 send money to Guernsey under that agreement; that they had in
3 the past when Guernsey was paying. There's none of that in
4 this complaint, your Honor. It's bereft of it and it's all
5 conjecture and it's like the Platton case where they try to
6 suggest there's a lot of different corporate entities that have
7 some relationship there must be a conspiracy. Frankly, it's
8 just not enough.

9 And on the statute of frauds argument, your Honor, the
10 cases suggest that this is the, precisely the type of mischief
11 that the Massachusetts Legislature enacted 259, Section 7 for.
12 It is a claim by somebody who, admittedly, does not have a
13 written contract with UK and LLP and it's a claim to get
14 commissions from them. And that is exactly why the statute is
15 drafted this way and it's exactly why it goes so far to say
16 implied in locklink like this unjust enrichment claim should be
17 dismissed.

18 And then on the trade or commerce, your Honor, I --
19 again, we, we have to look at the complaint as pled. It's pled
20 as an exclusive relationship between Guernsey and Whitman & Co.
21 There's no claim that these services were provided by anybody
22 else.

23 And I'd also suggest to your Honor if, in Debnam the
24 contract at issue that the First Circuit said was not trade or
25 commerce revolving [sic] these 60 truck drivers, the contract

1 at issue itself indicated that contractor could offer these
2 services elsewhere. He didn't. It wasn't alleged he didn't,
3 he did and that's exactly like Debnam. And the cite to that,
4 the contract, is 2010 WL 4132719, your Honor. And that's why
5 Debnam is directly on point here. It's an exclusive
6 relationship. That's the rationale of the First Circuit, your
7 Honor.

8 Unless you have other questions, those were just the
9 quick ones I ticked off.

10 THE COURT: No. Thank you.

11 And, Mr. Prickett, anything further?

12 MR. PRICKETT: Very briefly, your Honor --

13 THE COURT: Okay.

14 MR. PRICKETT: -- if I may.

15 THE COURT: Yes.

16 MR. PRICKETT: This is not the Platton case, your
17 Honor. The distinction is that in that case the plaintiff was
18 alleging one enterprise. The defendants were operating one
19 enterprise.

20 THE COURT: Uh-huh (indicating an affirmative
21 response).

22 MR. PRICKETT: We are not alleging that here. We
23 don't, from my point of view, have a basis to assert facts such
24 as pierce, that would support a piercing-the-corporate-veil
25 type. These are separate entities. Separate corporate

1 formalities, presumably, are being adhered to.

2 The -- and we are not saying that UK or LLP should be
3 paying under the contract. That is not our allegation. We are
4 saying that they shouldn't withhold the money that goes to
5 Guernsey.

6 And finally, with respect to the exclusive agreement,
7 we need to be precise about what that means. What exclusivity
8 are we talking about here? There is nothing that they have
9 said and certainly nothing in the agreement that precludes
10 Mr. Whitman from providing these services to any other
11 investment manager that, that he so chooses.

12 So this is different than the FedEx case.

13 Thank you --

14 THE COURT: All right.

15 MR. PRICKETT: -- your Honor.

16 THE COURT: Well, thank you both. It was well argued
17 and well briefed. So thank you for that.

18 And I will take it under advisement.

19 THE COURTROOM DEPUTY: All rise. This Court's in
20 recess.

21 (Proceedings concluded at 12:32 p.m.)

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ Janice Russell

June 18, 2015

Janice Russell, Transcriber

Date